84-1235

No.

Supreme Court, U.S.
FILED
JAN 31 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

JOHN W. WATERMAN,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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January 31, 1985

CASILLAS PRESS INC - 1717 K STREET NW WASHINGTON DC - 223-1220

QUESTIONS PRESENTED

1. "[W]hether an agreement to procure testimony about accomplished facts, which places a premium on testimony adverse to a defendant, creates a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause."

United States v. Waterman, 732 F.2d 1527, 1530, *rev'd by an equally divided court,* 732 F.2d 1533 (5th Cir. 1984).

2. Whether an accused is denied procedural due process when habeas corpus relief is denied by an equally divided court upon *en banc* consideration without including the vote of a judge who decided to grant relief upon panel consideration.

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No.

JOHN W. WATERMAN,
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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, John W. Waterman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circiut, which affirmed the judgment of the United States District Court for the District of Nebraska denying habeas corpus relief. A jury had convicted petitioner on five counts of mail fraud for which he was sentenced to ten years, five consecutive two-year terms of imprisonment.

OPINION BELOW

A unanimous panel of the court of appeals, including Chief Judge Lay, reversed the district court's denial of habeas corpus relief. *United States v. Waterman,* 732 F.2d 1527 (8th Cir. 1984), reprinted as Appendix A. Upon *en*

banc consideration, without the participation of Chief Judge Lay, the judgment of the district court was affirmed by an equally divided court and without opinion. Appendix B. A timely request for further *en banc* consideration was denied on November 2, 1984, without the participation of Chief Judge Lay, two judges dissenting. Appendix C.

JURISDICTION

The timely petition for a rehearing was denied on November 2, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In March, 1980, Eugene Gamst was indicted as the ringleader of an arson-for-hire scheme with several co-conspirators. In May, he agreed to testify concerning the conspiracy in a standard, universally accepted arrangement to testify fully and truthfully. In June, Gamst testified exhaustively against his co-conspirators concerning three critical fires. Petitioner, known to the indicting grand jury and Gamst, was not charged as a conspirator, unindicted co-conspirator or accomplice, or implicated during the trial.

After this trial, Gamst was sentenced and immediately began a twelve-year term in federal prison. Just as the 120-day jurisdiction limit on F.R.Crim.P. 35 was about to toll, after nearly four months of incarceration, Gamst agreed to cooperate once again. The government agreed to take a position at the Rule 35 hearing that Gamst should receive a two-year reduction in his prison term if further charges against "certain individuals" were brought, based

on his further cooperation.[1] Gamst then implicated petitioner in relatively unimpeachable ways, stating that Waterman contributed cash to the *same three fires* constituting the criminal venture and profited, in cash, from the Gamst scheme.

Both courts below found identical facts; they are simple and undisputed. The substance of the agreement was that if Gamst's cooperation led to further indictments, the government would affirmatively recommend that Gamst's sentence be reduced by two years; if no other individual were indicted, the government would not recommend any reduction in his sentence.

After petitioner's conviction, the government delivered on its promise to Gamst at his Rule 35 hearing.

REASONS FOR GRANTING THE WRIT

I. THE CONTINGENCY AGREEMENT TO OBTAIN THE INFORMANT'S TESTIMONY SO TAINTED THE INTEGRITY OF THE FACT-FINDING PROCESS AS TO DENY PETITIONER A FAIR TRIAL.

There can be no doubt that the contingency agreement invited falsehood, nor that such falsehood was, in fact, produced in this case.[2] Moreover, there can be no policy

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[1]At the original trial, *United States v. Stonys,* Cr. 80-0-32 (D.Neb. 1980), *aff'd sub nom United States v. Lemm,* 680 F.2d 1193 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 739 (1983), Gamst swore he had mentioned all of the persons who profited in this scheme, without naming petitioner. *Id.* at Tr. 1662. This testimony was changed at petitioner's trial. Tr. 48-49. Gamst understood his agreement with the government to be contingent on further charges against other persons. Tr. 302.

[2]See n.1, *supra.*

or systemic reason for the government to make any agreement with a man who stood in Gamst's position. In the federal system, if the grand jury is interested in questioning a convicted conspirator as to the full extent of his or her involvement in the conspiracy, the person is simply subpoenaed to the grand jury, where no fifth amendment interest against self-incrimination remains. It is not uncommon for a convicted conspirator who has not taken the stand in his or her own defense to be so subpoenaed and the government never has to negotiate for testimony so obtained. There is generally no need for the grand jury to direct inquiry to a person such as Gamst because he had already taken the stand for the government under oath to tell the whole truth concerning the conspiracy. If a need arises, the lawful and orderly method of procuring the testimony of a person who has waived the fifth amendment privilege is by subpoena. An immunity order can displace the privilege beyond the waiver, if necessary. No contract is called for; no price must be paid for the truth. Gamst had nothing to trade but falsehood.

Thus, review of this case provides an opportunity to examine the issue of contingency agreements without discussing the plea negotiation process. Gamst did not negotiate a plea. He negotiated and received a reduction in sentence through testimony about accomplished facts.

A significant body of authority supports the proposition in the panel opinion that there is "no place in due process law for positioning the jury to weed out the seeds of untruth *planted by the government.*" 732 F.2d at 1532 (emphasis added). Courts have generally recognized the need for due process to control the government's compilation and presentation of testimony.

As this Court explained in *Manson v. Braithwaite,* 432

U.S. 98, 102-114 (1977), due process and a fair trial can be denied by unduly suggestive identification procedures. No amount of cross-examination can cure the taint. The rationale for suppression is set forth at some length in *Manson*. Although "reliability is the primary factor," two other objectives must be kept in mind: deterrence and maintenance of the integrity of the judicial process. *Id.* All of these goals are met by the suppression of the testimony in this case. The government's own involvement in presenting the temptation to corrupt the truth-seeking function of the trial requires no lesser remedy.

The wisdom of the panel opinion is that it recognizes the appropriateness of the suppression remedy when the government has a hand in producing the unreliable evidence that the jury was allowed to consider. In this posture, the remedy is most ordinarily invoked by trial courts when the government declines to produce Jencks material. See 18 U.S.C. § 3500(d).[3] The functional remedy in a case such as *Napue v. Illinois,* 360 U.S. 264 (1959), is that upon retrial, the perjured testimony may not be used. *See Alcorta v. Texas,* 355 U.S. 28 (1957). The remedy is also consistent with other cases where irretrievable falsehood corrupted the truth-seeking function of the criminal process.[4]

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[3]*See e.g., United States v. Well,* 572 F.2d 1383 (9th Cir. 1978).

[4]See *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956) (remanding with directions to allow additional evidence before the Subversive Activities Control Board; appellants alleged new evidence showing that witnesses relied upon by the Board had perjured themselves in similar proceedings. "The untainted administration of justice is certainly one of the most cherished aspects of our institutions." *Id.* at 124); *Mesarosh v. United States,* 352 U.S. 1 (1956) (Smith Act conviction reversed and remanded for a new trial because of new evidence that a government witness lied; the court stated that federal courts have a responsibility "to see that the waters of justice are not polluted.").

Guidance can also be found in the authorities suppressing the in-court identification of defendants based on the irretrievable suggestivity of an out-of-court showup, lineup or similar confrontation. *Foster v. California,* 394 U.S. 440 (1969). *See also, United States v. Valdez,* 722 F.2d 1196, 1203 (5th Cir. 1984) (when a hypnotized subject who identifies for the first time a person he has reason to know is already under suspicion, the post-hypnotic identification is unreliable and therefore inadmissible).

Experienced prosecutors, defense attorneys and judges know that most informants motivated by fear of incarceration lack the moral restraint of reasonable men. Few prisoners under a final judgment who have informed before would not entertain an offer to reduce their terms by two years in exchange for testimony. As penalties by way of incarceration and forfeiture rise, the threat to the criminal justice system posed by contingency agreements for testimony increases. Gamst is not an informant who reported fraud when it was discovered. He confessed when he was charged with managing an illegal scheme; he was then incarcerated. Thereafter, to reduce his sentence, he expanded his scheme in relatively uncorroborated ways to include petitioner. A corrupt, yet ostensibly honest businessman such as Gamst is likely to draw broadly the outlines of the conspiracy he managed when his own sentence is so narrowed. All his business acquaintances, banker, lawyer, broker or supplier, are thereby exposed to false charges. The panel below correctly found that the criminal justice system cannot afford this risk of such prevarication and it nullified all agreements which invite or trust such a determination to a felon, much less to a professional insurance swindler such as Gamst.

The panel opinion is scholarly, convincing and widely read as the defense bar invokes what is now called the

"Waterman Doctrine" at every critical stage of the criminal process in the trial courts. The uncertain legacy of the opinion and the importance of the issue to the maintenance of the integrity of the criminal justice system plead for guidance by this Court.[5]

II. THE COURT OF APPEALS HAS ISSUED AN ORDER WHICH IS THE OPPOSITE OF THE MAJORITY VIEW OF THE COURT.

This cause came before a circuit panel consisting of Chief Judge Lay, Judge Heaney and Judge Bowman on appeal of a denial of a petition for a writ of habeas corpus. In a unanimous opinion authored by Judge Heaney and rendered on May 2, 1984, the panel reversed the district court, *United States v. Waterman,* 732 F.2d 1527 (8th Cir. 1984). App. A. The panel published a well-reasoned and now well-regarded opinion in support of its order directing habeas corpus relief. A request for *en banc* consideration was granted. On the date of oral argument, only eight judges were present; Chief Judge Lay was absent.

The *en banc* court affirmed the denial of habeas cor-

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[5]Compare, *People v. Kelly,* No. 3-84-0121 (3rd Dist. Ill. Jan. 8, 1985) (agreement found noncontingent); *United States v. Kenny,* Crim. No. 84-00007-01-P (D.Me. Dec. 5, 1984) (noting that the *Waterman* Doctrine is "ensnared in a welter of procedural confusion" because of the *en banc* order at issue here, acknowledging the persuasiveness of the panel opinion; agreement found noncontingent); *United States v. Spradley,* No. 84-3220 (11th Cir. Oct. 30, 1984) (agreement found noncontingent); and *United States v. Eschweiler,* 745 F.2d 435, 439 (7th Cir. 1984) (*Waterman* panel opinion cited; agreement found noncontingent) with *United States v. Baresh,* 595 F.Supp. 1132 (S.D.Tex. 1984) (*Waterman* panel opinion relied upon; mistrial granted); and *United States v. Dailey,* 589 F.Supp. 561 (D.Mass. 1984) (suppressing testimony of three prosecution witnesses in reliance upon *Waterman* panel opinion), *appeal pending,* No. 84-1578 (1st Cir.).

pus relief by an equally divided court, without opinion. Chief Judge Lay did not participate in this vote nor was his panel vote on the merits taken into consideration. App. B. A timely petition for rehearing by all nine judges[6] was denied, two judges in dissent without opinion. App. C.

Cases and controversies are to be "heard" and "determined" by the federal appellate courts. 28 U.S.C. § 46. That is, cases should be resolved. An appellate court has a responsibility to strive for a majority, even if it means rehearing a case. *Briscoe v. Bank of Kentucky,* 33 U.S. 118 (1834) (Marshall, C.J.).

Beyond the rendition of justice, a court must appear to do so. An objective evaluation of the posture of decision here does not meet this standard. A majority of the Eighth Circuit bench has voted in favor of habeas corpus relief yet it has been denied petitioner without opinion. This is apparently unprecedented. We respectfully submit that this case should be heard for this reason alone.

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[6]See *United States v. American Foreign S.S. Corp.*, 363 U.S. 685, 687 (1960) (noting such a petition); and *e.g., Alexander v. United States,* 173 F.2d 867, 181 F.2d 480 (9th Cir. 1950).

CONCLUSION

For all of the foregoing reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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January 31, 1985

APPENDIX A

UNITED STATES of America, Appellee,

v.

John Walter WATERMAN, a/k/a Jack Waterman, Appellant.

No. 83-2159.

United States Court of Appeals,
Eighth Circuit.

Submitted Feb. 13, 1984.

Decided May 2, 1984.

Michael Tigar, Washington, D.C., argued, for appellant.

Robert F. Kokrda, Omaha, Neb., argued, for appellee.

Before LAY, Chief Judge, and HEANEY and BOWMAN, Circuit Judges.

HEANEY, Circuit Judge.

John W. (Jack) Waterman appeals from the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (1982). Waterman claims that an agreement between the government and the star prosecution witness against him irreparably tainted that witness' testimony, depriving Waterman of the fundamental fairness protected by the United States Constitution. We hold that the government's agreement with its

key witness hampered the truth-finding function of the jury to a degree which cannot be reconciled with the fair procedures guaranteed by the due process clause of the fifth amendment. Because the testimony given pursuant to this agreement was critical to support Waterman's conviction, we reverse the district court's denial of his section 2255 motion.

We are not unfamiliar with Waterman or his case. A jury convicted him on five counts of mail fraud arising out of an arson-for-profit scheme conducted in Omaha, Nebraska, from 1976 through 1978. *See* 18 U.S.C. §§ 1341-1342 (1982). On June 17, 1982, the district court sentenced Waterman to two years imprisonment on each count, the terms to run consecutively, for a total sentence of ten years. Waterman appealed to this Court, alleging that the district court improperly refused to order the production of FBI notes concerning the pretrial interviews of a prosecution witness and challenging the sufficiency of the evidence supporting each count against him. *United States v. Waterman,* 704 F.2d 1014, 1016 (8th Cir. 1983). We found no merit to Waterman's allegation concerning the FBI notes, and held the evidence at trial sufficient to support four of the five counts on which Waterman was convicted. We reversed the conviction on the fifth count for insufficient evidence because it rested entirely upon the uncorroborated hearsay testimony of the ringleader of the fraudulent scheme, Eugene Gamst. *Id.* at 1017-1018.

Waterman then petitioned this Court for a panel rehearing or a rehearing en banc. He based this petition upon an allegedly improper agreement between the government and Gamst at the time of Waterman's trial. Gamst had previously pled guilty to participation in arson and fraud activities in Omaha and elsewhere. He received a twelve-

year sentence for his crimes pursuant to an agreement with the government to testify against others in the scheme. *Id.* at 1016. We upheld the convictions of several of Gamst's accomplices on direct appeal in *United States v. Lemm,* 680 F.2d 1193 (8th Cir.1982), *cert. denied,* 459 U.S. 1110, 103 S.Ct. 739, 74 L.Ed.2d 960 (1983). After the trial in *Lemm,* Gamst sought a reduction of his twelve-year sentence under Fed.R.Crim.P. 35. On petition for rehearing or rehearing en banc in the Waterman appeal, Waterman alleged that the government agreed to recommend a two-year reduction in Gamst's sentence if his continued cooperation led to further indictments. Waterman asserted that this "bounty" or "contingency" agreement tainted Gamst's testimony against him.

We declined to address this matter on Waterman's petition for rehearing or rehearing en banc with the following observations:

> Waterman's petition raises a serious matter. However, the alleged impropriety of the Government's agreement with Gamst was never raised on direct appeal as a matter of error by brief or directly in oral argument. In addition, it would appear that a factual record may need to be developed on this issue. Accordingly, we deny the petition for rehearing, but without prejudice to Waterman's presenting his claim to the district court by an appropriate petition under 28 U.S.C. § 2255 or under Rule 35 of the Federal Rules of Criminal Procedure.

United States v. Waterman, 716 F.2d 482, 482 (8th Cir.1983) (order on petition for rehearing.)

Waterman filed the present section 2255 motion on July 27, 1983. The district court held a hearing on the motion

on August 11, 1983. Waterman's counsel presented exhibits, stipulations of counsel, and argument regarding the allegedly improper agreement with Gamst.

The record developed below contains a December 16, 1980, letter from Gamst's attorney to an assistant United States attorney in Omaha setting forth the terms of a purported oral agreement for Gamst's further cooperation with the government.[1] The government attorney replied by letter dated December 18, 1980, stating that the gov-

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[1]The substance of the December 16, 1980, letter from Gamst's counsel was the following:

> You indicated to me that if Mr. Gamst cooperates in the Grand Jury investigation of certain individuals and if charges are brought against those persons you would, in the context of a motion to reduce sentence:
>
> 1. Affirmatively recommend to the Court that Mr. Gamst's sentence be reduced by a maximum of two years. It is my understanding that this two year period is not a limitation on the extent of any reduction for which we may move nor is it intended to be a limitation on the Court's authority to grant a further reduction if it deems such action appropriate.
>
> 2. You would inform the parole commission and any other appropriate persons of the fact and extent of Mr. Gamst's cooperation with the government.
>
> In the event Mr. Gamst cooperates, and no charges are brought, you indicated that:
>
> 1. You would acknowledge and inform the Court of Mr. Gamst's cooperation with the government. This would be done in the context of our Rule 35 motion, but would not involve any actual recommendation of a reduced sentence.
>
> 2. As I understand it, your willingness to inform the parole commission and, if appropriate, others of Mr. Gamst's cooperation is not contingent upon charges being brought.
>
> Therefore, I assume from your conversation that this action would be taken by you in return for cooperation irrespective of actual charges.

ernment "would be interested in Mr. Gamst's further cooperation by way of truthful testimony in any further Grand Jury investigations, indictments, and trials, if necessary." He agreed that "the government would be willing to acquiesce in a recommendation of two years reduction of sentence in the motion to reconsider sentence now pending."[2]

The district court considered these letters and a stipulation of counsel regarding their meaning, and received other evidence reflecting the government's actions after Gamst's testimony against Waterman. The court found:

> After Gamst's conviction and incarceration, he agreed to collaborate with the government in order to provide a basis for charging additional participants in the arson scheme. *The substance of the agreement was that, if Gamst's coopera-*

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[2]The key paragraph in the government's December 18, 1980, response read in full:

> As we have discussed, it now appears that there are further matters that warrant investigation in this arson enterprise. These matters may lead to criminal charges being brought against other individuals not known at the time the original charges were brought. Naturally, we would be interested in Mr. Gamst's further cooperation by way of truthful testimony in any further Grand Jury investigations, indictments, and trials, if necessary. Therefore, the government would be willing to acquiesce in a recommendation of two years reduction of sentence in the motion to reconsider sentence now pending before Judge Denney. We would also be willing to acknowledge his cooperation to other agencies and the Bureau of Prisons. Please note that the testimony of Mr. Gamst concerning his knowledge of these matters could well extend past the grand jury proceedings to any trials or hearings if necessary. Again, all that we would request would be his truthful testimony concerning his recollections of these matters.

> *tion in the form of truthful testimony led to further indictments, the government would (1) affirmatively recommend that Gamst's sentence be reduced by two years,* and (2) inform appropriate federal agencies of the fact and extent of Gamst's cooperation. *If, however, Gamst's testimony did not lead to the indictment of other individuals, then the government* would acknowledge and inform the Court of Gamst's cooperation, but *would not specifically recommend any reduction in his sentence.* The record reveals that as a result of Gamst's testimony at the grand jury investigation and trial of Waterman, the government in fact made an affirmative recommendation that Gamst's sentence of imprisonment be reduced by two years.

United States v. Waterman, CR 81-0-47 (D.Ne. August 17, 1983) (memorandum opinion and order) (emphasis added).

Waterman questioned the constitutionality of this agreement under the sixth amendment provisions ensuring the fairness of criminal proceedings and the due process clause of the fifth amendment. He also claimed that the agreement violated the spirit, if not the letter, of 18 U.S.C. § 201 (1982), which proscribes bribery of witnesses; that it encouraged perjury to an extent which could not be rectified by cross-examination; and that it undermined the integrity of our judicial system.

The district court disagreed with Waterman's assertions that the agreement with Gamst violated the Constitution or any other provision of law. The court noted that agreements not to prosecute or to recommend leniency in punishment in exchange for cooperation with the government have long been approved. It stressed that the

agreement with Gamst was admitted into evidence at the Waterman trial and subject to thorough cross-examination by Waterman's attorneys, that the agreement only supplemented Gamst's earlier commitment to testify truthfully as part of his plea bargain, and that substantial evidence other than Gamst's testimony supported Waterman's conviction. The court concluded that the governmen'ts conduct in this context did not violate the fundamental fairness mandated by the due process clause. *United States v. Waterman, supra,* CR 81-0-47 at 3-4. Waterman's appeal is in essence a disagreement with the legal conclusion drawn from the facts by the district court.

The parties have been unable to cite us any cases directly on point. We are not faced with the situation of a paid informant who might be more likely to entrap a defendant because of the contingent nature of her or his compensation. *See United States v. Civella,* 666 F.2d 1122, 1129 (8th Cir.1981). Nor do the facts before us resemble government participation in illegal activity with a defendant prior to trial through undercover agents or paid informants which, although not technically entrapment, is so outrageous as to deny the defendant due process of law. *See United States v. McCaghren,* 66 F.2d 1227, 1230-1231 & nn. 5-7 (8th Cir.1981). Likewise, we are not asked to find a due process violation based upon the government's failure to disclosure an immunity agreement with a prosecution witness. *See Giglio v. United States,* 405 U.S. 150, 153-155, 92 S.Ct. 763, 765-766, 31 L.Ed.2d 104 (1972); *United States v. Bigeleisen,* 625 F.2d 203, 205-210 (8th Cir.1980). Instead, we must decide whether an agreement to procure testimony about accomplished facts, which places a premium on testimony adverse to a defendant, creates a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause.

We recognized that an agreement granting government favors to a prosecution witness in return for truthful testimony about others is not *per se* illegal in *United States v. Librach,* 536 F.2d 1228, 1229-1230 (8th Cir.), *cert. denied,* 429 U.S. 939, 97 S.Ct. 354, 50 L.Ed.2d 308 (1976). In *Librach,* we went on to discuss the court's supervisory powers to require fair conduct at trial by the government, however, and held that the immunity agreement entered with a witness named Fowler in that case did not constitute unfair prosecutorial conduct. We stated,

> The agreement was made and binding upon the government before Fowler testified; it was not contingent upon the government's satisfaction with the content of the testimony. Fowler could testify truthfully and fully pursuant to the agreement without fear of reprisal. His testimony related to known facts; the agreement did not require the witness to seek out incriminating evidence against the appellant. * * * Further, the jury was fully apprised of the conditions under which Fowler testified.

Id. at 1230 (citations omitted).

These observations regarding the fair conduct of trials under a court's supervisory powers are equally applicable to the fundamental fairness mandated by the due process clause. Thus, we must now answer the question left open in *Librach* as to the fairness of agreements to reward those who testify for the government *contingent upon* the content and results of their testimony.

We agree with Waterman that the government cannot consistent with due process offer favorable treatment to a prosecution witness contingent upon the success of the prosecution. Such an agreement is nothing more than an

invitation to perjury having no place in our constitutional system of justice. The government attempts to avoid this common sense approach to due process in the instant case by distinguishing the agreement made with Gamst and emphasizing the jury's ability to decide upon the credibility of witnesses. It also declares that Waterman was not prejudiced by the agreement with Gamst. We cannot agree as a matter of law or fact.

Although the agreement in this case was contingent upon the government bringing charges against others, rather than upon successful convictions, we believe that the circumstances surrounding the agreement cast a shadow over both Gamst's pretrial cooperation with the government and his testimony at Waterman's trial. As the district court found, the contingency agreement to recommend a two-year reduction in Gamst's sentence supplemented his earlier agreement to cooperate in the government's continuing investigations and prosecutions involving the arson-for-profit scheme. Should Gamst have decided to stretch or disregard the truth to obtain Waterman's indictment, and thus a favorable recommendation pursuant to the contingency agreement on the motion to reduce his prior twelve-year sentence, he would be foolish to change his story during the Waterman trial at which he also was bound to testify. Moreover, the government's December 18, 1980, letter acknowledging the contingency agreement specifically referred to Gamst's "cooperation by way of truthful testimony in any further * * * trials, if necessary." Therefore, Waterman's claim that the contingency agreement tainted Gamst's testimony at trial is not a bald attempt to boostrap improprieties before the grand jury into constitutional trial error. *Cf. United States v. Calandra,* 414 U.S. 338, 345, 351, 94 S.Ct. 613,

618, 621, 38 L.Ed.2d 561 (1974) (indictment valid on its face cannot be challenged because the grand jury acted on inadequate, incompetent, or even unconstitutionally obtained evidence).

In addition, we cannot accept the argument that the jury, which was given notice of the contingency agreement, could legitimate this contingency agreement by deciding for itself whether Gamst was testifying truthfully. This is not the case where a defendant who thoroughly attacks a witness' credibility on cross-examination might therefore be unable to show prejudice in the government's failure to disclose a non-contingency immunity agreement with that witness. *See United States v. Smith,* 538 F.2d 1332, 1334 (8th Cir. 1976) (per curiam). This case involves not the undisclosed possibility of bias, but the disclosed encouragement and reward of bias. Waterman and the jury were made aware of the letters between Gamst's attorney and the government.[3] This disclosure was insufficient, however, to overcome the due process problems inherent in the contingency agreement itself. In the first place, the government's December 18, 1980, letter only vaguely adopted the contingent nature of the agreement, so the jury might have assumed that the government was committed to help Gamst in the same manner regardless of the fruitfulness of his cooperation. More fundamentally, however, we see no place in due process law for position-

[3]Perhaps the better course in this case would have been for Waterman to raise his due process objection to Gamst's testimony at his trial on the merits. Because the government has not objected to Waterman's failure to raise this issue before the trial court, we hold that Waterman should not be denied postconviction relief for any procedural defects in his motion. *See Manson v. Brathwaite,* 432 U.S. 98, 102 n. 7, 98 S.Ct. 2243, 2247, n. 7, 53 L.Ed.2d 140 (1977).

ing the jury to weed out the seeds of untruth planted by the government. Certainly Gamst might have lied regardless of the contingency agreement and the jury was generally commissioned to determine the truth of his testimony; but that is no reason for the government to give him further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others.

Finally, given our decision that the contingency agreement with Gamst violated the requirements of due process in Waterman's trial, we cannot accept the government's assertion that Waterman was not prejudiced by the violation. Although we noted on direct appeal that evidence independent of Gamst's testimony supported Waterman's convictions on the four counts which we affirmed, *United States v. Waterman, supra,* 704 F.2d at 1017, the independent evidence was not so overhwelming that the erroneous admission of Gamst's testimony could for this reason be labeled harmless.

The government alternatively argues that a lack of prejudice in this case may be established by the similarity between Gamst's testimony regarding Waterman in proceedings prior to the December, 1980, contingency agreement and his testimony at the Waterman trial after that agreement. We have serious reservations about this approach to measuring the prejudicial effect of the illegal agreement because it assumes that Gamst's prior testimony is an accurate benchmark for the truth. To the contrary, the contingency agreement might have simply been an added incentive for Gamst to again risk perjury conviction and continue in earlier stated lies.

Nonetheless, we have carefully reviewed Gamst's testimony at the trial of other participants in the fraudulent scheme during June and July of 1980, *United States v.*

Stonys, CR 80-0-32 (D.Neb.1980), *aff'd sub nom. United States v. Lemm, supra,* and compared that to the Gamst testimony at Waterman's trial. Gamst referred to Waterman in the earlier trial and stated that Waterman, as a real estate agent, obtained houses for Gamst and others with the knowledge that the houses would be burned for insurance profit. After the contingency agreement had been entered into, however, at the Waterman trial Gamst detailed times, places, conversations, and arrangements that gave factual context to Waterman's participation in the scheme. Significantly, at the Waterman trial Gamst recounted instances in which Waterman provided the front money to purchase several houses for arson and split the profits of the insurance proceeds with Gamst. None of the statements made by Gamst during prior proceedings intimated such a degree of involvement by Waterman. Thus, we cannot decide that Gamst's detailed testimony at Waterman's trial, which bolstered his conclusive inculpatory statements about Waterman before, was not influenced by the contingency agreement entered into by Gamst in the interim.

The government's last attempt to show lack of prejudice to Waterman is its claim that Gamst did not even know of the contingent nature of his agreement with the government. The district court made no finding of fact in this regard, but its memorandum opinion and order must be read to assume that Gamst had full knowledge of the contingency agreement. Indeed, Gamst testified at the Waterman trial that he knew the government had offered to make a recommendation for a two-year reduction in his sentence, which was consistent with the contingency agreement. Thus, we think as a matter of law that this record can only be read to establish that Gamst knew of the con-

tingency agreement both before and during Waterman's trial.

In sum, we are convinced that due process cannot be interpreted to allow the government to reward its witnesses based upon the results of their testimony., There simply is no reason to offer a witness favorable treatment for anything other than truthful cooperation in the government's quest for justice. For the above reasons, we reverse the district court's denial of Waterman's section 2255 motion and remand with directions to the district court to vacate Waterman's sentence and order his release from custody. The government of course is free to retry Waterman.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-2159

United States of America, Appellee, v. John Walter Waterman, a/k/a Jack Waterman, Appellant.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: September 13, 1984

Filed: September 20, 1984

Before HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, en banc.

ORDER

This case has been considered by the Court en banc.* Judges Heaney, Bright, Arnold, and Bowman would reverse the district court and adhere to the panel opinion. Judges Ross, McMillian, John R. Gibson, and Fagg would affirm the district court. Therefore, the judgment of the

district court is affirmed by an equally divided Court.

A true copy.
Atteset:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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*Chief Judge Donald P. Lay did not participate in the vote on this case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2159-NE. September Term, 1984

UNITED STATES OF AMERICA,	*	
	*	
Appellee,	*	
	*	Appeal from the
VS.	*	United States
	*	District Court
JOHN WALTER WATERMAN,	*	for the District
a/k/a JACK WATERMAN	*	of Nebraska.
	*	
Appellant.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judges Gerald W. Heaney and Myron H. Bright would have granted the petition.

Judge Donald P. Lay did not participate.

Petition for rehearing by the panel is also denied.

November 2, 1984